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In the Supreme Court of the United States

OCTOBER TERM 1954

NO. 567

STATE OF MONTANA, ex rel. FORD JOHNSON,
Petitioner,

vs.

THE STATE BOARD OF LAND COMMISSIONERS OF THE STATE OF MONTANA, as Governing Board of the Department of State Lands and Investments, J. HUGO ARONSON, Governor of the State of Montana, President of said Board, MARY M. CONDON, Superintendent of Public Instruction of the State of Montana, SAM W. MITCHELL, Secretary of State of the State of Montana, ARNOLD H. OLSEN, Attorney General of the State of Montana, as members of said Board, and LOU W. BRETZKE, Commissioner of State Lands and Investments,
Respondents.

BRIEF OF THE STATE OF NORTH DAKOTA AS AMICUS CURIAE

LESLIE R. BURGUM,
Attorney General of the
State of North Dakota.

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BRIEF OF THE STATE OF NORTH DAKOTA AS AMICUS CURIAE

The State of North Dakota, by its Attorney General, respectfully submits this brief as *amicus curiae* in support of the petition for writ of certiorari in the above-entitled case. Rule 42(4). The issues raised by the petition are of substantial concern to the State of North

Dakota, and it is of major importance to that State that the decision of the Supreme Court of Montana be reviewed, and reversed.

* * * * * *

North Dakota was admitted to the Union pursuant to the same Enabling Act which was applicable to South Dakota, Washington and Montana. Act of February 22, 1889, C. 180, 25 Stat. 676. That Act granted to each of those four states certain lands in trust for support of the public schools, and, in Section 11, specified conditions equally applicable to each of the four States governing the sale and lease of such lands. As amended by the Act of April 13, 1948, C. 183, 62 Stat. 170, this Section now provides that oil and gas leases on such lands "shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective states."

The Board of University and School Lands, pursuant to statutory authority,[1] has executed many oil and gas leases on these lands so granted by the 1889 Act. The leases have been similar to that summarized in a recent opinion of the North Dakota Supreme Court:

> "The lease in question gives to the lessee the right to explore and exploit the oil and gas resources underlying the land described therein for a term of five years, and as long thereafter as oil or gas or either of them is produced from the land by the lessee."[2]

The validity of leases containing what is generally known as an "habendum clause" of this type, under Sec-

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1 **N. D. Rev. Code, 1943,** Sec. 15-0509, as amended by **N. D. Laws 1951, C. 232,** Sec. 5, and **N. D. Laws, 1953, C. 337.**

2 **State ex rel. Rausch v. Amerada Petroleum Corp.,** 78 N. D. 247, 49 N. W. 2d 14, 17 (1951).

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tion 11 of the Enabling Act (and under the Constitution of North Dakota), was raised in this State in *State ex rel. Rausch v. Amerada Petroleum Corp.*, 78 N. D. 247, 49 N. W. 2d 14 (1951). That case challenged a lease of the type summarized above as invalid because the legislative enactments which authorized its execution were "in conflict with and contrary to the provisions of the Enabling Act and the Constitution of North Dakota, specifically Section 11 of the Enabling Act * * *" 49 N. W. 2d at p. 17. The Supreme Court of North Dakota upheld the state legislation and the lease executed under it. The court pointed out that, regardless of whether such leases could have been authorized prior to the 1948 amendment to Section 11 of the Enabling Act (49 N. W. 2d at p. 19):

> "Congress has removed all doubt as to the right of a state to enter into leases for the production of minerals, including leases for the exploration for oil and gas, by amending the Enabling Act. The Legislature of North Dakota, insofar as the Enabling Act and its amendments are concerned, had full power to provide for the execution of oil and gas leases."

The *Amerada Petroleum Corp.* decision involved a lease dated November 10, 1948, which had been executed under the broad permissive provisions of Section 15-0509, N. D. Rev. Code 1943.[3] The financial advantage to the State of executing leases containing habendum clauses in accordance with the usual business practice was so great, however, that this was made mandatory in 1951. Chapter 232 of the N. D. Laws, 1951, Section 5, provided:

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[3] "The board of university and school lands may lease any lands under its control believed to contain oil, gas, coal, cement materials, sodium sulfate, sand and gravel, road material, building stone, chemical substances, metallic ores, or colloidal or other clays, and may make and establish rules and regulations for development and drilling operations."

> "All leases hereunder shall be made for a period of not less than five years and shall continue in effect under the terms thereof as long as oil or gas may be produced thereon in commercial quantities."[4]

The decision of the Supreme Court of Montana which is sought to be reviewed here is squarely in conflict with the *Amerada Petroleum Corp.* case on the interpretation of Section 11 of the Federal Enabling Act, as amended. The State of North Dakota now owns and holds 996,895.97 acres of land granted by the Enabling Act, of which a substantial portion lies in actual or probable oil or gas bearing areas. As noted above, the Board of University and School Lands has executed numerous oil and gas leases on these lands which contain the standard habendum clause. As of December 31, 1953, some 884,613.28 acres of school lands had been leased on such terms. In that year the total proceeds to the State Public School System from such leases amounted to $559,892.57 or 1.9 plus % of the total public school operating expenditures. As the table below shows, both the acreage of school lands so leased and the income therefrom has steadily increased in recent years, and it is anticipated that this increase will continue.

Year	Acreage of School Lands under Lease Containing Habendum Clause	Proceeds Received from such Leases
1949	448,203.44	$ 122,050.86
1950	552,860.56	$ 138,215.14
1951	672,570.08	$ 519,985.84
1952	837,999.00	$ 1,795,359.75
1953	884,613.28	$ 559,892.57
1954	793,309.72	$ 916,115.93

[4] These provisions were re-enacted in N. D. Laws, 1953, C. 337.

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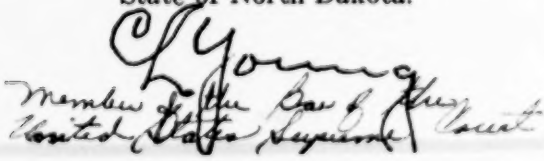
The decision of the Supreme Court of Montana necessarily raises a question in the minds of oil and gas leaseholders and prospective leaseholders on North Dakota school lands with respect to the correctness of the interpretation of the Enabling Act which was adopted by the Supreme Court of North Dakota; in effect, it casts a cloud on the title of outstanding oil and gas leases on some 793,309.72 acres of North Dakota school lands. Of even more importance, so long as this question remains unresolved by a definitive decision of this Court, prospective new lessees may be unwilling to purchase leases containing habendum clauses in accordance with North Dakota law, or may give effect to the present doubts as to validity by substantially lower bids on such leases. The importance of this adverse effect on the very substantial income which would otherwise be expected to be received in the future from oil and gas leases on North Dakota school lands cannot be overstated.

CONCLUSION

The State of North Dakota believes that the decision of its Supreme Court in the *Amerada Petroleum Corp.* case correctly interpreted Section 11 of the Enabling Act as amended, and that the decision of the Supreme Court of Montana sought to be reviewed here is erroneous. For the reasons set forth in the Petition for Writ of Certiorari as well as in this Brief, the State of North Dakota accordingly urges that the petition be granted, and that the judgment of the Supreme Court of Montana be reversed.

Respectfully submitted,

LESLIE R. BURGUM,
Attorney General of the
State of North Dakota.



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